

ORIGINAL

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U.S. COURTS

02 JUN - 3 PM 4:24

WESTERN DISTRICT  
CATHOLIC J. DONKE  
CLERA IDAHO

Attorney for Defendant  
CRUZ RUBALCAVA-RODRIGUEZ

UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO

UNITED STATES OF AMERICA,	)	
	)	CR 02-003-S-EJL
Plaintiff,	)	
	)	DEFENDANT'S MOTION FOR
v.	)	DOWNWARD DEPARTURE
	)	
CRUZ RUBALCAVA-RODRIGUEZ,	)	
Defendant.	)	

COMES NOW the defendant, CRUZ RUBALCAVA-RODRIGUEZ, by and through his counsel of record, S. Richard Rubin, Federal Defenders of Eastern Washington and Idaho, and respectfully submits his MOTION FOR DOWNWARD DEPARTURE outside the applicable sentencing guideline range pursuant to U.S.S.G. §5K2.0. The defendant has been scheduled for sentencing on June 24, 2002, in Boise, Idaho.

This motion is based upon the instant motion, the attached memorandum, the files and records in the above-entitled cause, and any and all other matters that may be brought to the attention of the Court prior to, or at the time of, the hearing on this motion.

RESPECTFULLY SUBMITTED this 31 day of May, 2002.



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Attorneys for Defendant

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CRUZ RUBALCAVA-RODRIGUEZ

6 UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO

7 UNITED STATES OF AMERICA, )  
8 ) CR 02-003-S-EJL  
Plaintiff, )  
9 v. ) MEMORANDUM IN SUPPORT OF  
MOTION FOR DOWNWARD DEPARTURE  
10 CRUZ RUBALCAVA-RODRIGUEZ, )  
Defendant. )  
11 \_\_\_\_\_ )

12 COMES NOW the defendant, CRUZ RUBALCAVA-RODRIGUEZ, by and through his  
13 counsel, S. Richard Rubin, Federal Defenders of Eastern Washington and Idaho, and submits  
14 the following memorandum in support of his motion for downward departure pursuant to USSG  
15 § 5K2.0.

16 I. BACKGROUND

17 Mr. Rubalcava is 31 years of age and was born in Sinaloa, Mexico. He is the third child  
18 and has nine siblings. His entire family resides in the Gooding/Wendell area and he came to  
19 the United States as a youngster with his father and settled in the south central Idaho area.  
20 Except for periods of deportation he has mainly resided in the area. He was initially raised in  
21 Mexico and started working when he was approximately twelve years old. He has a good  
22 relationship with his parents and continues to have regular contact with them.

23 Mr. Rubalcava, as a result of two relationships, has two children, a son and a daughter.

1           On April 8, 2002, Mr. Rubalcava pursuant to a written plea agreement, entered a plea  
2 of guilty to the sole count listed in the indictment. In exchange for his plea of guilty, the  
3 government agreed that unless they learned of new information to the contrary, Mr. Rubalcava  
4 would be entitled to a reduction for acceptance of responsibility. Additionally, the government  
5 agreed to a two level departure from the sentencing guideline range pursuant to Rule  
6 11(e)(1)(C) based upon his agreement to a reinstatement of a previous order of removal. That  
7 entire agreement was contingent on the defendant having less than eighteen history points (he  
8 has eleven), not applying for further downward departures and the court not finding an  
9 inappropriate provision in the plea agreement. Additionally, Mr. Rubalcava agreed to waive all  
10 appeal and other post conviction rights he had regarding his conviction and sentence in  
11 exchange for the terms of the agreement and promised not to appeal or otherwise contest his  
12 conviction or sentence on any grounds except those contained in Title 18 U.S.C. § 3742 and  
13 in any post conviction proceeding, including any proceeding authorized by Title 28 U.S.C. §  
2255, for ineffective assistance of counsel.

#### 14                                   ARGUMENT

15           In response to the perception that sentence courts meted out unjustifiably disparate  
16 sentences to similarly situated offenders, Congress passed the Sentencing Reform Act of 1984  
17 and created the United States Sentencing Commission (the "Commission"). The Commission  
18 was charged with "developing a comprehensive set of sentencing guidelines". The  
19 Commission formulated a set of guidelines commonly known as the United States Sentencing  
20 Guidelines (the "Sentencing Guidelines"). The sentencing court must now "impose on a  
21 defendant a sentence falling within the range of the applicable guidelines if the case is an  
ordinary one."

22           In the several years since the adoption of the guidelines, most, if not all, of the circuits  
23 developed multi step approaches to reviewing sentences that involved departures from the

1 guidelines. The 9th Circuit was no exception. In *United States v. Lira-Barraza*, 941 F.2d 745  
2 (9th Cir. 1991)(*en banc*), the court rejected a five step approach to reviewing departures in  
3 favor of a more streamlined three-part test.

4 The Supreme Court changed all of that in *Koon v. United States*, 518 U.S. 81, 116  
5 S.Ct 2035, 135 L.Ed.2d 392 (1996), where the court noted as a general proposition that "a  
6 district court's decision to depart from the guidelines...will in most cases be due substantial  
7 deference, for it embodies the traditional exercise of discretion by a sentencing court". *Id.* at  
8 98, 116 S. Ct. 2046.

9 Whether a given factor is present to a degree not adequately considered by the  
10 commission, or whether a discouraged factor none the less justifies departure because it is  
11 present in some unusual or exceptional way, are matters to be determined in large part by  
12 comparison with the facts of other guidelines cases. District courts have an institutional  
13 advantage over appellate courts in making these sorts of determinations, especially as they  
14 see so many more guidelines cases than appellate courts do. *Id.* at 98, 116 S. Ct. 2047. In  
15 light of those considerations, the Court declared that a unitary abuse of discretion standard  
16 was to be used when reviewing departure decisions.

17 By ruling as it did, the Court effectively rejected each of the multi step approaches to  
18 reviewing sentencing departures that had been adopted by the various circuits and "collapsed"  
19 the steps into a single inquiry. See *United States v. Cali*, 87 F.3d 571, 579-80 (1st Cir.  
20 1986).

21 To say that departure decisions must be reviewed for an abuse of discretion, however,  
22 says nothing about what factors a district court should take into consideration when  
23 confronted with question of whether or not to depart in a particular case. Fortunately, the  
24 Supreme Court spelled out just what those factors should be:

25 A sentencing court considering a departure should ask the following questions:

1 "1. What features of this case, potentially, take it outside the guidelines' "heartland"  
and make of it a special, or unusual, case?"

2 "2. Has the commission forbidden departures based on those features?"

3 "3. If not, has the commission encouraged the departures based on those features?"

4 "4. If not, has the commission discouraged departures based on those features?"

5 *United States v. Rivera*, 994 F.2d 942, 949 (C.A. 1 1993).

6 The 9th Circuit agrees with that summary. *See United States v. Sablan*, 114 F.3d 913  
7 (9th Cir. 1997). If the special factor is a forbidden factor, the sentencing court cannot use it  
8 as a basis for departure. The forbidden factors would include race, sex, national origin, creed,  
9 religion, socio-economic status, lack of guidance as a youth, drug or alcohol dependence, and  
economic duress.

10 If, on the other hand, the special factor is an encouraged factor, the court is authorized  
11 and encouraged to depart if the applicable guideline does not already take it into account. If  
12 the special factor is a discouraged factor, or an encouraged factor, already taken to account  
13 by the applicable guideline, the court should depart only if the factor is present to an  
14 exceptional degree or in some other way makes the case different from the ordinary case  
15 where the factor is present. If a factor is unmentioned in the guidelines, the court must, after  
16 considering the structure and theory of both relevant individual guidelines and the guidelines  
17 taken as a whole, decide whether it is sufficient to take the case out of the guidelines  
heartland. *Koon*, 518 U.S. 81, 116 S.Ct. 2035 (citations omitted).

18 Thus said, the defense contends that there is sufficient basis for a downward departure  
19 from the guideline range in this case based upon the following reason:

20  
21 ***1) A Downward Departure Should Be Granted for Mr. Rubalcava's Stipulation***  
22 ***Pursuant to a "Fast Track" Program Agreeing to the Reinstatement of the***  
23 ***Previous Deportation Order.***

The stipulation pursuant to a "fast track" program was meant to benefit the defendant, promote efficiency, and expedite the prosecution of illegal reentry cases in the various jurisdictions. *United States v. Lopez-Osuna*, 240 F.3d 1991 (9<sup>th</sup> Cir. 2000). In fact, the Ninth Circuit has held that the District Court may grant a downward departure even where the defendant consents to deportation and the government objects. *United States v. Rodriguez-Lopez*, 198 F.3d 773 (9<sup>th</sup> Cir. 1999). In this instance, however, the government has not objected and, in fact, made that a part of the plea agreement (page 4 - Plea Agreement). The justification for such two level departure is that the sentencing guidelines did not adequately take into account the savings to the government resulting from the combination of the fast track plea and the uncontested reinstatement of the prior order of deportation, exclusion or removal, including reduced expenses for conducting hearings and for housing and transporting the defendant pending hearings in both the district court and the immigration court.

This district has uniformly approved such downward departures particularly when agreed to by the defendant and the government. The Ninth Circuit has approved this practice as late as last month in the case of the *United States v. Hernandez-Castalanos*, 287 F.3d 876 (9<sup>th</sup> Cir., 2002).

Although the court may have concerns about the defendant's criminal history, nevertheless, that is taken into account by the defendant's criminal history and it would simply be unfair to punish him twice for that criminal history by considering it in light of the downward departure for the reinstatement of the deportation order.

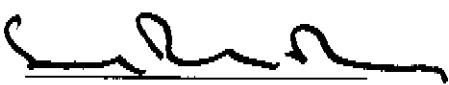
## CONCLUSION

For the foregoing reasons, Mr. Rubalcava respectfully requests that the court grant his motion for a downward departure which is agreed to by the government for his agreeing to the reinstatement of the previous deportation order. The guideline calculation

1 would then be as follows:

2	Base Offense Level	8
	Specific Offense Characteristics	4
3	Adjusted Offence Level	12
	Adjustment for Acceptance	
4	of Repsonsibility	-2
	Downward Departure	-2
5	Total Offense Level	8

6  
7 RESPECTFULLY SUBMITTED this 31 day of May, 2002.

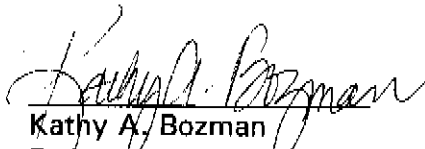
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10 Samuel Richard Rubin  
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14  
15  
16 **CERTIFICATE OF SERVICE**

17 I hereby certify that on this 31 day of May, 2002 I served a true and  
18 complete copy of the within and foregoing MOTION FOR DOWNWARD DEPARTURE and  
MEMORANDUM IN SUPPORT OF MOTION FOR DOWNWARD DEPARTURE via general mail  
delivery upon the following parties to the above-entitled action:

19 Kim Lindquist  
Assistant United States Attorney  
20 Box 32  
Boise, ID 83707

21  
22   
Kathy A. Bozman  
23 Federal Defenders of Eastern  
Washington and Idaho